Supreme Court, U.S.
FILED
DEC 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-819

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

JAMES F. COLLINS, JR.; TAMMY LEE COLLINS; KIMBERLEE HUCKABY; JOAN S. PATTON; CHERYL SULLENGER,

Petitioners,

vs.

WOMANCARE, A FEMINIST WOMEN'S HEALTH CENTER, a California nonprofit corporation; DEBORAH FLEMING; PATRICIA O'NEIL,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK E. MERIN
DICKSTEIN & MERIN
1001 Sixth St., Suite 501
Sacramento, CA 95814
(916) 443-6911

Attorney for Respondents

QUESTION PRESENTED

While petitioners have stated the question they wish the Court to address, respondents would phrase the relevant question as follows: Does a citizen's arrest which is not followed by a conviction for violating a criminal statute necessarily subject the citizen making the arrest to liability in federal court premised on a violation of 42 U.S.C. Section 1983?

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 7

A. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY DETERMINED THAT A PRIVATE PARTY'S VIOLATION OF THE STATE'S LAW PERMITTING CITIZEN'S ARRESTS DID NOT CONSTITUTE "STATE ACTION" SUFFICIENT TO CONFER FEDERAL JURISDICTION UNDER 42 U.S.C. SECTION 1983 7

B. CALIFORNIA'S STATE SUPREME COURT CAN NOT MAKE A CITIZEN'S ARREST A BASIS FOR FEDERAL JURISDICTION . . 12

IV. CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Bryant v. Donnell,
239 F.Supp. 681 (W.D. Tenn., 1965) . . 10

Cary v. Continental Airlines, Inc.,
823 F.2d 1402 (10th Cir. 1987) 10

Civil Rights Cases,
109 U.S. 3 (1883) 9

Flagg Bros., Inc. v. Brooks,
436 U.S. 149 (1978) 9

Gorenc v. Salt River Project,
869 F.2d 503 (9th Cir. 1989) 14

In Re Lance W.,
37 Cal.3d 873, 210 Cal.Rptr. 631 (1985) 14

Lee v. Town of Estes Park,
820 F.2d 1112 (10th Cir. 1987) 10

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 1, 8, 11

People v. Zelinski,
24 Cal.3d 357 (1979) 12, 13

Shakespeare v. Wilson,
40 F.R.D. 500 (S.D. Calif. 1966) . . . 10

Warren v. Cummings,
303 F.Supp. 803 (Dist. of Co., 1969) . 10

OTHER AUTHORITY

42 U.S.C. Section 1983 . . . . . 4, 7, 10

California Constitution,
Article I, Section 28(d) 14

Penal Code Section 837(1) 8

I

INTRODUCTION

On June 23, 1989, the United States Court of Appeals for the Ninth Circuit, acting through a three-judge panel, issued its opinion reversing the District Court's grant of summary judgment for petitioners. The Court also reversed the District Court's directed verdict for petitioners on their false arrest claims, together with the jury's award of damages, both having been infected with the infirmity the Court of Appeals detected in the District Court's grant of summary judgment: the failure to apply the tests in Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982), to determine the existence of state action.

On September 15, 1989, the Court of Appeals for the Ninth Circuit rejected petitioners' request for a rehearing and a rehearing en banc, with the entire Court

impliedly endorsing the panel's decision as no Judge of the Court requested a vote on the suggestion for rehearing en banc.

As the prevailing party below, respondents, Womancare, a California nonprofit corporation, its Executive Director and Director, respectively, Deborah Fleming and Patricia O'Neil, urge this Court to deny petitioners' Petition for Writ of Certiorari on the multiple grounds that there is no disagreement among the Circuits on the issue presented, and that the question raised is not one of serious concern to the public at large generally.

II

STATEMENT OF THE CASE

On October 5, 1984, Womancare obtained an injunction in State Superior Court prohibiting the Bible Missionary Fellowship, its pastor, Dorman Owens, the Independent Baptist Church, and 200 Does, their agents, servants,

officers, employees, representatives, and all persons acting in concert or participating with them, from engaging in or performing, directly or indirectly, certain specific acts, including "yelling, screaming, assaulting, disparaging, or defaming each other or the clients of [Womancare]", and conducting their picketing and/or preaching "any closer than across the street from [Womancare's] property".

On October 1, 1985, while a group of protestors demonstrated across the street from Womancare's premises in compliance with the Court's preliminary injunction, petitioners James Collins, Jr., Tammy Collins, Kimberlee Huckaby, Joan Patton, and Cheryl Sullenger, picketed on Womancare's side of the street, occasioning Womancare's representatives informing them of the injunction and requesting that they move to the other side of the street or face arrest. Petitioners refused to

move, and officers from the San Diego City Police Department were called.

Upon arrival, a City Police Officer spoke with the demonstrators but took no action, advising Womancare's representatives that they could make citizen's arrests, but cautioning against this action which could expose them to civil liability. After consulting with counsel who advised that they could make citizen's arrests of those violating the injunction, respondents Fleming and O'Neil placed petitioners under citizen's arrest, whereupon the police issued misdemeanor citations for violating the injunction. Those citations, however, were dismissed prior to trial in San Diego Municipal Court.

When the criminal charges were dismissed, petitioners filed an action in Federal Court claiming violation of their Constitutional rights under 42 U.S.C. Section 1983, and appending a state claim for malicious prosecu-

tion. The Section 1983 claim was based on the alleged violation by respondents of petitioners' First Amendment right to freedom of speech and assembly, which was allegedly curtailed by the attempted enforcement against them of the State Court preliminary injunction.

The petitioners moved for summary judgment in Federal Court, and Judge Earl B. Gilliam granted the motion based on his conclusion that petitioners were not in violation of the State Court injunction, that respondents' citizen's arrest of petitioners was action taken "under color of state law", since (according to Judge Gilliam):

> a private citizen who effectuates a citizen's arrest is performing a function of the state and acts under color of state law, and by arresting petitioners, respondents violated their Constitutional right of free speech and assembly protected by the First Amendment.

The remaining issue of malicious prosecution proceeded to trial, but was amended,

after the close of evidence, to become a claim for false arrest which was decided in favor of the petitioners by directed verdict. On the issue of damages, which was sent to the jury, petitioners were each awarded $1,800 in compensatory and $10,000 in punitive damages.

On appeal, the grant of summary judgment was reversed and, as both the directed verdict and the jury's damage award depended on the Court's granting of the summary judgment motion, they too were reversed, and the entire matter was remanded, with the false arrest count to be retried, presumably in State Court as no federal jurisdiction would remain.

After the Court of Appeals denied their motion for rehearing, petitioners filed this Petition for Writ of Certiorari.

///

///

///

///

III

ARGUMENT

A. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY DETERMINED THAT A PRIVATE PARTY'S VIOLATION OF THE STATE'S LAW PERMITTING CITIZEN'S ARRESTS DID NOT CONSTITUTE "STATE ACTION" SUFFICIENT TO CONFER FEDERAL JURISDICTION UNDER 42 U.S.C. SECTION 1983.

The Court of Appeals for the Ninth Circuit analyzed the petitioners' position to require, in order to state a claim, that the Womancare employees falsely arrested them, that is, made citizens' arrests when, in fact, no public offenses were committed or attempted in their presence. With this premise, the Court of Appeals then considered whether Womancare's acts in violation of a state statute conferred federal jurisdiction under Section 1983, and concluded that they did not.

This was no new proposition formulated by the Ninth Circuit Court of Appeals, but rather a re-statement of a long-established principle whose abrogation would expose all private

parties to "Constitutional litigation whenever they seek to rely on some state rule governing their interaction with the community surrounding them", in violation of the principles in Lugar, supra, 457 U.S. at 937, 940.

Only when there has been an abuse of authority could violation of a state statute (here the California citizen's arrest statute - Penal Code Section 837(1)) confer Section 1983 jurisdiction. But to find "abuse of authority", the Court would first have to have concluded that Womancare employees were state actors - a circularity of reasoning rejected by the Ninth Circuit.

While concluding that the Collins group's theory that Womancare employees were state actors while making citizen's arrests failed to meet the test in Lugar, supra, because they acted contrary to the relevant state policy (United States District Court's decision, at 6778, attached as Appendix A to petitioners'

Petition), the Ninth Circuit also explained that the private deviation from state statutes could be remedied by state courts and thus would be no occasion for Section 1983 relief, citing Stevens' dissent in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 at 176-178 (1978), and Civil Rights Cases, 109 U.S. 3 at 17 (1883).

Yet the Court did analyze the relationship, contrary to petitioners' charge in their petition, between the San Diego Police Officers and Womancare employees to determine if there was "joint action" which might extend the state mantle to cloak Womancare's actions with state authority. Based upon the agreed facts that (1) there was no allegation of conspiracy to link Womancare's employees with the San Diego Police; (2) the impetus for the arrests came from Womancare employees, not the San Diego Police; (3) the state agents used independent judgment vis-a-vis the Collins group; and (4) no coercion or encouragement by

the state of Womancare's actions existed, the Court declined to find "joint action" sufficient to confer Section 1983 jurisdiction.

Petitioners, despite the unanimity among the Circuits -- all of the federal cases located on point hold that a citizen's arrest does not constitute state action or action under color of state law (Cary v. Continental Airlines, Inc., 823 F.2d 1402 (10th Cir. 1987); Lee v. Town of Estes Park, 820 F.2d 1112 (10th Cir. 1987); Warren v. Cummings, 303 F.Supp. 803 (Dist. of Co., 1969); Shakespeare v. Wilson, 40 F.R.D. 500 (S.D. Calif., 1966); Bryant v. Donnell, 239 F.Supp. 681 (W.D. Tenn., 1965)) -- ask this Court to break with precedent, logic, consistency and tradition and to announce a new rule that all citizen's arrests confer Section 1983 jurisdiction on the federal courts. To do so would invite an avalanche of federal cases filed by persons

subjected to citizen's arrests, who, for any reason, were not convicted of criminal violations following their arrests.

Surely it was primarily this expansion of federal jurisdiction which the court refused to sanction in Lugar, supra, when it laid out a test for determining when conduct by private parties is under color of state law, that is "fairly attributable to the State":

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

The Ninth Circuit was correct in refusing to find a basis for federal jurisdiction in the mere citizen's arrest by a private party of persons believed to be in violation of a

court injunction restricting picketing. Petitioners' Petition for a Writ of Certiorari to the Court of Appeals should be denied on this basis.

B. **CALIFORNIA'S STATE SUPREME COURT CAN NOT MAKE A CITIZEN'S ARREST A BASIS FOR FEDERAL JURISDICTION.**

Petitioner argues that a California Supreme Court case, People v. Zelinski, 24 Cal.3d 357 (1979), makes a citizen's conduct "action under color of state law" when he "formally arrests a suspected thief". Claiming a "conflict" between the California Supreme Court's interpretation of the "color of state law" standard and the Ninth Circuit's opinion, petitioners allege this conflict warrants this Court's granting of petitioners' Petition for a Writ of Certiorari, and invite the Court to take this opportunity to decide "to what extent, if any, the state may delegate one aspect of police protection (power to arrest) to private parties 'and

thereby avoid the strictures of the Fourteenth Amendment'."

Respondent urges the Court not to accept this invitation, since (1) there is no conflict between California and the Ninth Circuit; (2) the federal courts are the authorities on what constitutes action under color of state law; and (3) Zelinski, supra, was both superceded by Lugar, supra, and invalidated by California State Proposition 8.

In People v. Zelinski, supra, the California Supreme Court held that private department store security guards who "conduct[ed] an illegal search ... while engaging in a statutorily authorized citizen's arrest" engaged in state action. There, the issue was a violation of the right of privacy - the search - in violation of the State Constitution. Of course, the federal courts which may look to state court precedent, are not bound by such interpretations of federal

law (Gorenc v. Salt River Project, 869 F.2d 503, 506 (9th Cir. 1989)); but more importantly, Zelinski, supra, pre-dates Lugar, supra, by three years, and may not even now still be good law in California in view of the passage of Proposition 8, which admits all evidence seized, even in violation of state or federal law, unless its exclusion is compelled by the federal Constitution. (In Re Lance W., 37 Cal.3d 873, 888, 210 Cal.Rptr. 631 (1985); California Constitution, Article I, Section 28(d).)

IV

CONCLUSION

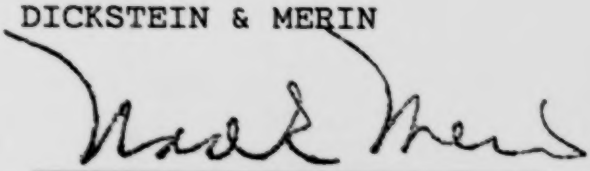
Since this case was correctly decided below, since there is no dispute among the circuits on the relevant issue, and since there are no important issues of first impression on which this Court must rule, respondents respectfully urge this Court to

deny petitioners' Petition for a Writ of Certiorari.

December 15, 1989

Respectfully submitted,

DICKSTEIN & MERIN



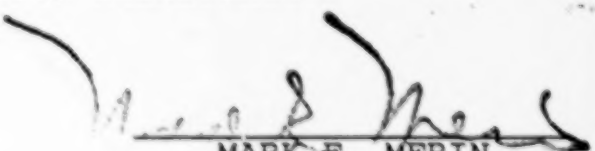
By Mark E. Merin
Attorney for Respondents

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, and counsel of record for respondents in the matter before this court entitled Collins, et al. vs. Womancare, et al. My business address is 1001 Sixth Street, Suite 501, Sacramento, California 95814. On December 15, 1989, I caused to be served **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

Lloyd Edward Tooks, Esq.
P.O. Box 126237
San Diego, CA 92112

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 15, 1989, at Sacramento, California.



MARK E. MERIN